

Office of Chief Counsel
Internal Revenue Service

memorandum

CC:NER:MAN:TL-N-1154-99

DARosen

date:

to: District Director, Manhattan District
ATTN: Chief, Examination Division
(Revenue Agent Helen Chin)

from: District Counsel, Manhattan (CC:NER:MAN)

subject:

Tax Year: [REDACTED] (Form 1120-F)
Consent to Extend the Statute of Limitations on Assessment
STATUTE OF LIMITATIONS EXPIRES [REDACTED]

UIL Nos. 6501.08-09, 6501.08-17, 9103.01-00, 9103.02-00

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INTRODUCTION

We have been asked for advice regarding the individuals who may execute a consent to extend the statute of limitations on assessment on behalf of the above-referenced taxpayer for a pre-merger year. In addition, we have been asked for assistance in determining the appropriate language to be used on the consent to extend the statute of limitations on assessment.

FACTS

The Manhattan District is currently conducting an examination of [REDACTED] (" [REDACTED] ") (E.I.N. [REDACTED]) for income tax for the tax year [REDACTED]. A consent to extend the statute of limitations on assessment for [REDACTED], for income tax for the tax year [REDACTED] is currently being sought from [REDACTED] - und [REDACTED] (" [REDACTED] ").

[REDACTED]

[REDACTED] (E.I.N. [REDACTED]) is a stock corporation formed under the laws of Germany. On or about [REDACTED], [REDACTED] entered into a merger agreement with [REDACTED] - und [REDACTED] (" [REDACTED] "), also a corporation formed under the laws of Germany. Pursuant to a certified English translation of the Commercial Register ([REDACTED])¹ provided to us by the taxpayer, [REDACTED]'s shareholders resolved to increase its authorized share capital to implement the merger with [REDACTED]. ([REDACTED] at [REDACTED]). The [REDACTED] further represents that [REDACTED] was to be merged into [REDACTED], with all shares of [REDACTED] existing at the effective date of the merger to be exchanged for ordinary bearer shares of the merged [REDACTED]. ([REDACTED] at 18).

[REDACTED]

The entity emerging from the merger changed its name to [REDACTED] - und [REDACTED] (" [REDACTED] "). [REDACTED] is represented by a board of managers (the " [REDACTED] "). According to the [REDACTED], [REDACTED] is represented either by two members of the [REDACTED] or jointly by a member of the [REDACTED] and a prokurist.²

¹ We were not provided with any copies of the German-language merger documents. This advice is based on a copy of the certified English translation of the [REDACTED], dated [REDACTED]. Infra.

² A prokurist is a signatory whose authority is defined to include all actions which concern the operations of the business. As discussed infra, the appointment (and the termination) of a prokurist must be set forth in the [REDACTED]. The registration states whether the prokurist is authorized to act or sign alone, or whether he must act jointly with a member of the [REDACTED] or another prokurist. §§ 48-53 HGB.

All members of the [REDACTED] and prokura are set forth in the [REDACTED].

For the purpose of signing the consent to extend the statute of limitations on assessment on behalf of the taxpayer, [REDACTED] has offered a power of attorney appointing any two members of the [REDACTED] (or duly appointed successor management body) which as of [REDACTED] is composed of (i) [REDACTED], (ii) [REDACTED], (iii) [REDACTED], (iv) [REDACTED], and (v) [REDACTED] [REDACTED], as attorneys and lawful agents in the name and on behalf of the [REDACTED] or of its New York Branch, as the case may be, in connection with any and all United States Federal and State Tax Matters currently pending or that may arise in the future, and in connection therewith, irrevocably authorizing any two such members, acting jointly, to sign all forms, documents, consents, and agreements and to perform any other act or deed necessary or deemed desirable. It is our understanding that the above-named individuals are full-time employees of [REDACTED].

[REDACTED] has further offered, through its Office of General Counsel, to provide a written representation that the two members of the [REDACTED] who signed the above power of attorney still have the authority set forth in the certified English translation of the [REDACTED], dated [REDACTED].

ISSUES

1. May a copy of the certified English translation of the [REDACTED] be relied upon to address the issues set forth in Issues 2 through 4, infra.

2. Which individuals have authority to sign the consent to extend the statute of limitations on assessment on behalf of the taxpayer for a pre-merger tax year.

3. May the individuals who have the authority to sign the consent to extend the statute of limitations on assessment on behalf of the taxpayer for a pre-merger tax year delegate their authority, pursuant to the power of attorney that has been offered by [REDACTED].

4. What specific language, if any, should be used on the consent to extend the statute of limitations on assessment for a pre-merger tax year.

DISCUSSIONIssue 1.The [REDACTED]

Under German law, a stock corporation, called an [REDACTED], is required to set forth its structure and ability to act through its officers and employees in the [REDACTED], a public document intended to be relied upon by third parties in dealing with the [REDACTED]. § 34(3) AktG; See generally Killius, 962 T.M., Business Operations in Germany (1999). For example:

1. An [REDACTED] does not exist as a separate legal entity until registered in the [REDACTED]. § 41(1) AktG.

2. Any amendments to the articles of the [REDACTED] must be done by shareholders' resolution, which is notarized and filed for registration in the [REDACTED]. The amendment is not effective until it is so registered in the [REDACTED]. §§ 179 and 181 AktG.

3. Any reorganization or merger involving the [REDACTED] is not effective until its provisions are set forth in the [REDACTED]. § 20(I) UmwG.

4. Registration of corporate officers in the [REDACTED] is not required. However, such registration serves to protect bona fide third-parties who deal with the [REDACTED]. § 15 HGB.

5. The appointment (and the termination) of a prokurist must be set forth in the [REDACTED]. §§ 48-53 HGB.

Consequently, we believe that the information set forth in the certified English translation of the [REDACTED] may be relied upon to address the issues set forth in Issues 2 through 4, infra, as long as [REDACTED] provides you with a written statement that there have been no relevant changes to the [REDACTED] as of the date of the certified English translation.

Issue 2.Individuals Who May Sign Form 872

Under I.R.C. § 6501(c)(4), the Service and a taxpayer may consent in writing to an extension of the time for making an assessment if the consent is executed before the expiration of the normal period of assessment, or the extension date agreed upon in a prior extension agreement between the parties. In order to extend the period for assessment in the case of a corporate return, a Form 872 must be executed.

Pursuant to I.R.C. § 6061, any return, statement, or other document made under any internal revenue law must be signed in accordance with the applicable forms or regulations. However, the regulations under I.R.C. § 6501(c)(4) do not specify who may sign consents executed under this section. Accordingly, the Service will apply the rules applicable to the execution of returns to the execution of consents to extend the statute of limitations on assessment. Rev. Rul. 83-41, 1983-1 C.B. 349, clarified and amplified, Rev. Rul. 84-165, 1984-2 C.B. 305. In the case of corporate returns, I.R.C. § 6062 provides that a corporation's income tax return shall be signed by the president, vice-president, treasurer, assistant treasurer, chief accounting officer or any other officer duly authorized to act. Accordingly, under the provisions of Treas. Reg. § 1.6062-1, returns that are required to be made by corporations under the provisions of subtitle A or subtitle F of the Internal Revenue Code with respect to any tax imposed by subtitle A (which includes corporate income taxes) shall be signed by the president, vice-president, treasurer, assistant treasurer, chief accounting officer, or any other officer duly authorized to sign such returns.

Based upon the facts set forth supra, the Form 872 in the present matter may be signed jointly by two members of the [REDACTED]. However, [REDACTED] seeks to delegate that authority through the previously discussed power of attorney. We now address this issue:

Issue 3.Power of Attorney

An officer or officers duly authorized to act on behalf of a corporation may grant their authority to extend the statute of limitations on assessment on behalf of the corporation to a full-time employee or employees of the corporation. See Treasury Department Circular 230, 31 C.F.R. § 10.7(c)(1)(iv), 1966-1 C.B. 1171. Such a grant of authority must be enumerated in a power of attorney, which must set forth, in relevant part, (1) the name and mailing address of the taxpayer; (2) tax identification number of the taxpayer; (3) name and mailing address of the recognized representative(s); (4) description of the matter(s) for which representation is authorized which, if applicable, must include the type of tax involved, the federal tax form number, and the specific year(s)/period(s) involved; and (5) a clear expression of the taxpayer's intention concerning the scope of authority granted to the recognized representative(s). Treas. Reg. § 601.503(a). In addition, a full-time employee or employees appointed under such a power of attorney must make a written declaration in conformity with Treas. Reg. § 601.502(c). The requirements of Treas. Reg. §§ 601.502(c) and 601.503(a) are satisfied by a properly completed Form 2848-Power of Attorney and Declaration of Representative. Treas. Reg. § 601.503(b)(1).

However, if a power of attorney fails to include some or all of the above information required by Treas. Reg. §§ 601.502(c) and 601.503(a), the attorney-in-fact can cure this defect by executing a Form 2848 (on behalf of the taxpayer) which includes the missing information. Treas. Reg. § 601.503(b)(3). Attaching a Form 2848 to a copy of the original power of attorney will validate the original power of attorney (and will be treated in all circumstances as one signed and filed by the taxpayer) provided the following conditions are satisfied-

(i) The original power of attorney contemplates authorization to handle, among other things, Federal tax matters (e.g., the power of attorney contains language to the effect that the attorney-in-fact has the authority to perform any and all acts).

(ii) The attorney-in-fact attaches a statement (signed under penalty of perjury) to the Form 2848 which states that the original power of attorney is valid under the laws of the governing jurisdiction.

Treas. Reg. § 601.503(b)(3)(i)-(ii).

As discussed infra, [REDACTED] has offered a power of attorney appointing any two members of the [REDACTED] (or duly appointed successor management body) which as of [REDACTED], is composed of (i) [REDACTED], (ii) [REDACTED], (iii) [REDACTED], (iv) [REDACTED] and (v) [REDACTED], as attorneys and lawful agents in the name and on behalf of the [REDACTED] or of its New York Branch, as the case may be, in connection with any and all United States Federal and State Tax Matters currently pending or that may arise in the future, and in connection therewith, irrevocably authorizing any two such members, acting jointly, to sign all forms, documents, consents, and agreements and to perform any other act or deed necessary or deemed desirable. It is our understanding that the above-named individuals are full-time employees of [REDACTED].

Under the requirements of Treas Reg. § 601.503(b)(2), this power of attorney is not effective in delegating the authority to sign the Form 872 to the above individuals.³ However, the power of attorney clearly contemplates authorization to handle Federal tax matters, in conformity with Teas. Reg. § 601.503(b)(3)(i). Accordingly, if the following is attached to a copy of this power of attorney, it will be effective under Treas Reg. § 601.503(b)(3):

(1) A completed Form 2848 signed by the attorneys-in-fact on behalf of the taxpayer.

(2) A statement (signed under penalty of perjury by the attorneys-in-fact) which states that the original power of attorney is valid under the laws of the governing jurisdiction.

(3) [REDACTED]'s representation that the two members of the [REDACTED] who signed the original power of attorney still have the authority set forth in the certified English translation of the [REDACTED], dated [REDACTED].

We recommend that you forward a request for the power of attorney with the above attachments to [REDACTED]'s Office of General Counsel, attention [REDACTED].

³ It is our understanding the [REDACTED] has claimed that it would be extremely difficult or impossible to have two members of the [REDACTED] execute a Form 2848.

Issue 4.Language for Form 872

As set forth above, [REDACTED] survived the merger with [REDACTED], changing its name to [REDACTED] - und [REDACTED]. The name of the taxpayer appearing on the Form 872 should be as follows:

" [REDACTED] - und [REDACTED]
[REDACTED] (E.I.N. [REDACTED]),
formerly known as [REDACTED]
[REDACTED] (E.I.N. [REDACTED]) "

Prior to forwarding the Form 872 to the attorneys-in-fact for their signatures, please forward a copy of the power of attorney, with attachments, to Attorney Daniel A. Rosen in order for our office to confirm that they have been prepared in accordance with the advice set forth herein. Should you have any questions regarding this matter, please contact him at (212) 264-5473, extension 262.

FRANCES FERRITO REGAN
Acting District Counsel

By: _____
PETER J. LABELLE
Assistant District Counsel

Noted:

FRANCES FERRITO REGAN
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